Supreme Court, U.S.
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No. 96-467

In The

Supreme Court of the United States

October Term, 1996

JERRY JONES, ET AL.,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners have waived any argument that *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), upon which the District Court and Seventh Circuit Court of Appeals relied, is inconsistent with this Court's decision in *International Union, United Auto Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966), and should thus be overturned since no such argument was made below by the Petitioners.

2. Whether the Petition for Writ of Certiorari should be denied where Petitioners have not shown any inconsistency between the Seventh Circuit Court of Appeals' Opinion Below and its decision in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), and this Court's decision in *International Union, United Auto Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966) and whether the writ should be denied even if a purported conflict existed.

3. Whether the Petition for Writ of Certiorari should be denied where Petitioners have not shown any inconsistency between the Seventh Circuit Court of Appeals' opinions in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), and in *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995) and whether the writ should issue even if such a conflict existed.

LIST OF ALL PARTIES TO THE PROCEEDINGS

General Electric Company itself has common stock and debt securities which are publicly traded. General Electric Company also has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held.

Those with publicly-held equity securities are:

- CAMCO, Inc. (Canada)
- General Electric Capital Corporation (formerly General Electric Credit Corporation)
- Montgomery Ward & Co., Incorporated
- Nuovo Pignone (Italy)

Those which have only publicly-held debt securities are:

- Credit DeL'Est
- Finax FS AB
- Finax KK AB
- GE Capital Aviation Services, Ltd.
- GE Capital Mortgage Services, Inc.
- GE Capital (NZ) Ltd. (New Zealand company)
- GE Capital PTY LTD. (Australian company)
- GECC Financial Corporation (Hawaii)
- GNA Corporation

LIST OF ALL PARTIES TO THE PROCEEDINGS – Continued

- Gate Finance Corporation
- General Electric Capital Canada, Inc.
- General Electric Capital Services, Inc. (formerly General Electric Financial Services, Inc.)
- General Electric Credit International, N.V.
- Imaging Financial Services, Inc. (formerly Eastman Kodak Credit Corp.)
- International GE Capital Corporation
- Mercur Bank (Austria)
- Service Bank GmbH

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, case number 95-2281, is reported at 87 F.3d 209 and is reproduced in Petitioners' Appendix ("App.") at page 2. The opinion of the United States District Court for the Northern District of Indiana, case number 1:95-CV-11-AS, is unreported and is reproduced in Petitioners' Appendix at page 13.

BASIS FOR JURISDICTION

Petitioners have correctly stated the grounds on which they seek to invoke the jurisdiction of this Court.

STATUTES INVOLVED

The state statutes involved are IND. CODE § 34-1-2-1.5 and IND. CODE § 34-1-2-2(6), and these statutes are correctly set forth in the Petition and reproduced in Petitioners' Appendix at page 19.

STATEMENT OF THE CASE

On January 11, 1995, petitioners filed suit under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, a statute which provides the basis for federal jurisdiction for violations of collective bargaining agreements entered into between labor unions and employers engaged in interstate commerce. In the Complaint, plaintiff, Jerry Jones as representative of a class of

plaintiffs and as a member of a union, alleged no pendent state claims but only a violation of his contractual rights under the collective bargaining agreements between the unions, United Electrical Radio and Machine Workers of America ("UE") and International Electrical Radio and Machine Workers of America ("IUE"), and the defendant General Electric Company ("GE").

In his Complaint, Jones alleged that he was a member of the United Electrical Radio and Machine Workers of America ("UE") while employed at GE's plant in Decatur, Indiana, and that he was employed under a collective bargaining agreement which was in effect from June 27, 1988 through 1991. When, in 1989, the Decatur plant closed permanently, Jones and other employees were transferred to GE's Fort Wayne, Indiana, plant where they became members of the International Electrical Radio and Machine Workers of America ("IUE") and were employed under a collective bargaining agreement between GE and the IUE.

Jones further alleged that GE breached the collective bargaining agreements under which he was employed with respect to his seniority and service credits when he was transferred to GE's Fort Wayne, Indiana, plant following the closure of its Decatur, Indiana, plant. Jones also alleged that he was told he would have certain seniority and service credit rights which he alleged did not come about and that GE misrepresented what his seniority and service credit rights would be after he was transferred. Lastly, Jones alleged in the Complaint that he pursued the grievance procedure as required by the parties' collective bargaining agreements and that he exhausted all grievance resolution procedures as set forth

therein. Jones did not allege in the Complaint the existence of any other written contract between the parties other than the collective bargaining agreements. Moreover, Jones failed to sue the unions or allege a breach of the unions' duty of fair representation which they owed to him.

General Electric filed a Motion to Dismiss on the grounds that the Complaint was fatally deficient in that Jones failed to name the unions and allege a breach of their duty of fair representation as required under section 301. In the alternative, GE argued that Jones's Complaint was untimely as it was filed more than six months after his cause of action arose. In its reply brief, GE also argued, in the alternative, the application of a two-year statute of limitations which the trial court applied in dismissing the Complaint. Jones conceded that his Complaint was time-barred if either the six-month or two-year statutes applied, but argued instead in favor of a ten-year statute of limitations.

The United States District Court for the Northern District Of Indiana, Fort Wayne Division, following the Seventh Circuit's decision in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), held that Indiana's two-year statute of limitations for employment-related actions applied to the cause of action rather than the ten-year statute of limitations urged by Jones. Thus, the action was time-barred. On Jones's appeal to the United States Court of Appeals for the Seventh Circuit, the court affirmed the district court's decision holding that despite the fact that Indiana's two-year statute of limitations for employment related actions

exempted actions based upon written contracts, it remained the most analogous state statute of limitations.

ARGUMENT

THE PETITION SHOULD BE DENIED SINCE PETITIONERS HAVE PRESENTED NO COMPELLING REASONS FOR REVIEW

The decision of the Court of Appeals in the present case is correct, and Petitioners present no compelling reason for issuing the writ. The decision of the Seventh Circuit breaks no new ground in interpreting any issue of federal law, and has not been shown by petitioners to be inconsistent with any decision of this Court or any decision of any other federal court of appeals. Thus the petition should be denied. *See* SUP. CT. R. 10 (setting forth the considerations governing review on certiorari). Moreover, the questions presented by petitioners are ones which have no significance beyond the State of Indiana, and, at bottom, fundamentally involve an interpretation of state law; namely, the resolution of an Indiana statute of limitations issue. Accordingly, a less likely candidate for certiorari could scarcely be imagined.

A. The Errors Claimed by the Petitioners Were Waived, and Petitioners Have Proffered No Compelling Reasons for Review.

It is well-settled that where an argument is not presented to a court of appeals, but is presented for the first time in this Court, this Court will almost invariably decline to consider it. *See, e.g., DeShaney v. Winnebago*

County Department of Social Services, 489 U.S. 189, 195 n.2, 109 S.Ct. 998, 103 L. Ed. 2d 249 (1989); *Kosak v. United States*, 465 U.S. 848, 850 n.3, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984). Moreover, in the present case, although petitioners now assert that the Seventh Circuit misconstrued *International Union, United Auto Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966), the petitioners failed to cite, let alone discuss, *Hoosier Cardinal* in either of their briefs in the Court of Appeals. Hence, any question as to whether the Seventh Circuit correctly applied *Hoosier Cardinal* was not preserved in the lower court in such a fashion as would justify this Court's intervention. Moreover, since petitioners do not even assert a conflict between the opinions of the Seventh Circuit and any ruling of *any* other court of appeals, no one but the petitioners has ever claimed that the opinion relied upon by the Seventh Circuit, *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), is in conflict with *Hoosier Cardinal*. Thus the claimed error which, as discussed *infra* is no error, hardly presents a compelling reason for this Court to grant certiorari.

B. The Petitioners, In Erroneously Alleging an Intra-Circuit Conflict and a Conflict Between the Seventh Circuit and This Court, Put Forth No Compelling Reason for Review.

1. Although Petitioners Allege a Conflict Between the Seventh Circuit and This Court, No Such Conflict Is Present and, Even Assuming the Presence of Such a Conflict, No Compelling Reason for Review Has Been Presented.

Petitioners here misstate the holding of the Court of Appeals in this case, claiming that the court "has extrapolated [the] reasoning of *Hoosier Cardinal* to conclude that for purposes of the Indiana employment related claims statute, which expressly excepts out written contracts, a collective bargaining agreement is not a written contract." Petition for Writ of Certiorari at 7. However, in this case, the Court of Appeals actually held that in a case such as this, where the only written contract upon which the claim is based is a collective bargaining agreement, the action "is not entirely based on a written contract." *Jones*, 87 F.3d at 212 (App. at 8) (quoting *Home Elevator*, 798 F.2d at 230 & n.9). Such a holding is entirely consistent with *Hoosier Cardinal* since therein this Court held that

> [p]roof of the breach and of the measure of damages, however, both depend upon proof of the existence and duration of *separate employment contracts between the employer and each of the employees*. Hence this § 301 suit may fairly be characterized as one not exclusively based upon a written contract.

Hoosier Cardinal, 383 U.S. at 1114 (emphasis added).

Precisely the same circumstances are presented here. Petitioners did not plead that this action was based entirely on a written contract. In the Complaint, Jones avers that when he transferred to another plant he did not receive the benefits that he was "told" he would receive. *Jones*, 87 F.3d at 212 (App. at 8). These facts fall squarely within the confines of *Hoosier Cardinal* and *Home Elevator*. As set forth in the Seventh Circuit's opinion, the only substantive argument advanced by petitioners (and advanced belatedly) that *Home Elevator* was distinguishable (*id.* at 212-13 (App. at 8-10)) is unpersuasive because Petitioner failed to plead a separate written contract between himself and GE. But the question of whether one decision of the Seventh Circuit can be distinguished from another decision of the Seventh Circuit is one which falls far below this Court's threshold for certiorari, and would be so fact-based as to vitiate the requirement that the focus of the writ be upon issues of overriding national importance.

Jones argued that a letter written to a co-worker which he may have received constitutes a written contract entitling him to a ten-year statute of limitation. In specifically addressing this argument, the Seventh Circuit found that *none* of the elements for a written employment contract as required under Indiana law were present. *Id.* at 213 (App. 9-10). Indiana law requires a contract of employment to contain four items: 1) the place of employment; 2) the period of employment; 3) the nature of the service the employee is to render; and 4) the compensation the employee is to receive. *Majd Pour v. Basic Am. Medical, Inc.*, 512 N.E.2d 435, 439 (Ind. Ct. App.

1987) (App. p. 9). Thus the decision of the Seventh Circuit presents no conflict with the decisions of this Court.

As the Court of Appeals observed, the facts of this case are "very similar to *Home Elevator.*" *Id.* (App. at 8). In *Home Elevator,* the Seventh Circuit concluded in that a section 301 action in which "the basic allegation . . . is that a company breached the collective bargaining agreement," *Home Elevator,* 798 F.2d at 227, the two-year Indiana statute would apply, since such an action is not entirely based on a written contract, *id.* at 230 & n.9. Petitioners in this case sought to distinguish *Home Elevator,* but did not seek to have the Seventh Circuit overrule it. *Jones,* 87 F.3d at 212 (App. at 8). However, before this Court, the petitioners argue that *Hoosier Cardinal* is inconsistent with *Home Elevator* and, in effect, seek a ruling overturning *Home Elevator,* although no challenge to *Home Elevator* was presented in the Seventh Circuit. As noted above, an argument not raised in the lower court is generally waived.

Moreover, as recently noted by several members of this Court,

> in the present day federal court system, where review by this Court is almost entirely discretionary, a different regime [from where there is an appeal as of right] prevails. We receive nearly 7,000 petitions for certiorari every Term, and can grant only a tiny fraction of them. A high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction, and our Rule 10 embodies the standards by which we decide to grant review. One of the reasons contained in Rule 10.1(a) is the existence of a conflict between one court of appeals and another.

> The negative implication of this ground, borne out time and again in our decisions to grant and deny certiorari, is that *ordinarily a court of appeals decision interpreting one of our precedents – even one deemed to be arguably inconsistent with it – will not be reviewed unless it conflicts with a decision of another court of appeals.* This fact is a necessary concomitant of the limited capacity in this Court.

Hubbard v. United States, ___ U.S. ___, ___, 115 S. Ct. 1754, 131 L. Ed. 2d 779, 798 (1995) (Rehnquist, C.J., dissenting) (emphasis added). Thus, even if the Seventh Circuit had misapplied the precedent of this Court, such a misapplication does not present a "compelling" reason to grant the petition since petitioners have not alleged that the Seventh Circuit's decision below is in conflict with any other decision of its sister circuits. Accordingly, the Petition for Writ of Certiorari should be denied.

2. Although Petitioners Allege a Conflict Within the Seventh Circuit, No Such Conflict Is Present And, Even Assuming the Presence of Such a Conflict, No Compelling Reason for Review Has Been Presented.

In their Petition for Writ of Certiorari, the petitioners allege that the Seventh Circuit erred in applying *Home Elevator* and, in doing so, created an intra-circuit conflict. However, as the Seventh Circuit pointed out in the opinion below, the result reached in this case is identical to the rule which has prevailed in such actions in the federal courts in Indiana for ten years. *Jones*, 87 F.3d at 212 (App.

at 8). Hence, the petitioners could not and do not maintain that the application of a two-year statute of limitations in this case – a period of limitations which the Seventh Circuit has applied to such actions since *Home Elevator* – presented them with any sudden or surprising change in the governing law.

Indeed, the petitioners' assertion to this Court that the Seventh Circuit erred in applying *Home Elevator* and was *required* to apply a ten-year Indiana statute of limitations in such actions (as the court did in *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995)) is even less persuasive given the utter lack of equity underlying the petitioners' position. In *Home Elevator*, the Seventh Circuit concluded that a two-year statute of limitations was "consistent with federal labor disputes and contractual agreements to submit grievances to arbitration." *Jones*, 87 F.3d at 212 (App. at 8) (citing *Home Elevator*, 798 F.2d at 230 & n.9). Petitioners do not even venture an explanation as to why the application of a ten-year statute of limitations would further federal labor policy or otherwise further an equity other than the petitioners' own particular position. Petitioners obliquely concede that this Court in *Hoosier Cardinal* did take into consideration the policy of timely resolution of labor relations claims and acknowledged that Indiana's statute of limitations for a written contract was not applied by this Court in *Hoosier Cardinal* because the statute "was seemingly too lengthy to fulfill the policies behind labor relations claims." (Petition at p. 7).

Although the Seventh Circuit's opinion demonstrates the applicability of *Home Elevator*, the petitioners challenge this application stating that it is inconsistent with

the Seventh Circuit's later holding in *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995). Leaving aside for the moment the question of whether such inconsistency presents a compelling reason to review the lower court decision, it must be noted first that there is no inconsistency. As set out above, the court found the facts in *Jones* to fall within the confines of *Home Elevator*. Later in the opinion, the Court of Appeals specifically addressed the inconsistency argument and distinguished *Anderson* on two grounds. First, *Anderson* was not a section 301 action; it was an ERISA action. Second, the contract at issue in *Anderson* was a life insurance contract, "much more substantial than the one-page clarification letter" Jones offered. *Jones*, 87 F.3d at 213. The Petitioners present no new argument here and advance no reason why this Court should grant Petitioners' petition.

Moreover, even if this Court were to find an inconsistency between opinions in the Seventh Circuit, such an inconsistency would not present the type of issue on which this Court would routinely exercise its very limited jurisdiction. As noted by Justice Frankfurter, the Court must be

> consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, *and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.*

Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 385 n.1, 69 S.Ct. 606, 93 L. Ed. 741 (1949) (Frankfurter, J., dissenting) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*,

261 U.S. 387, 393, 43 S.Ct. 422, 67 L. Ed. 712 (1923)) (emphasis added). There is no conflict between the circuits, merely a claimed conflict between two opinions in the same circuit. Especially considering the fact that there is no conflict, the petitioners have presented no compelling reason for the exercise of this Court's jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The petitioners argue that the extraordinary exercise of this Court's jurisdiction is justified for several reasons. However, the reasons presented are not compelling. First, petitioners argue error which was not raised in the lower courts and is thus waived. Next, the petitioners argue that the Seventh Circuit's decision conflicts with both an opinion of this Court and a Seventh Circuit opinion. However, none of these alleged conflicts exist and, even assuming they did, the conflicts are not of the type which would justify this Court's exercise of its jurisdiction. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 25th day of October, 1996.

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